

*a***THE HONGKONG & SHANGHAI BANKING
CORPORATION LIMITED****v.****TAN SOCK GIN***b*

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[ORIGINATING SUMMONS NO: 31-273-1988]
22 JUNE 1999

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LAND LAW: *Sale of land - Application for - Land secured by way of third party charge pursuant to overdraft facility - Whether charge valid - Whether defendant liable for payment of interest on principal sum - Whether plaintiff estopped from bringing action - Whether notice of demand ambiguous - Whether cause to the contrary - Whether application dismissed*

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The plaintiff applied for an order of sale of the defendant's property which was secured by way of a third party charge by virtue of an overdraft facility that was granted by the plaintiff to a company known as Ms Weng Thye Chiang Hatchery.

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The defendant claimed that she was not liable for any payment of interest and raised the issues of illegality and enforceability of the charge. The defendant also claimed that estoppel applied on the basis that the plaintiff had earlier offered the defendant for a settlement in the sum of RM260,000 wherein the defendant had steadfastly refused to pay claiming that her liability did not exceed RM200,000. The offer was deemed to have been turned down and the

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matter not pursued any further. Finally, the defendant claimed that the demand sum was in excess of her liability under the charge.

Held:*g*

[1] Based on the evidence, the plaintiff had a right to charge interest as therein stated.

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[2] On the facts the defendant could not rely on the principle of estoppel as there was no element of mutuality or reciprocity. The defendant could not now be allowed to resuscitate the offer which had already fizzled out. Since estoppel did not apply, the claim for full settlement of the debt did not arise. Accordingly, the charge was valid and enforceable.

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[3] The notice of demand in Form 16E served on the defendant was ambiguous. It stated a sum in excess of the defendant's liability under the charge for the principal sum and did not add the words "and interest". Further, there was some discrepancy and suspicion as to how the amount claimed in the said notice was arrived at. The notice was therefore

defective and of no effect. Accordingly, the defendant had succeeded in showing cause to the contrary. **a**

[Application dismissed with liberty to reapply after proper notice served on defendant.]

Case(s) referred to: **b**

Central Malaysian Finance Bhd v. Loke Kok Lai [1975] 1 MLJ 160 (**refd**)
Gondola Motor Credit Sdn Bhd v. Al-Murisi Holdings Sdn Bhd [1992] 4 CLJ 2212 (**refd**)

Jacob v. Oversea-Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161 (**refd**)
Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 (**refd**)
Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1998] 1 MLJ 157 (**refd**) **c**

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 (**refd**)
Mary Michael v. UMBC Bhd [1971] 1 MLJ 172 (**refd**)
Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd [1999] 1 CLJ 810 (**refd**)
The Australian Widow's Fund Life Assurance Society Limited v. National Mutual Life Association of Australasia Limited [1914] 17 CLR 657 (**refd**) **d**

Legislation referred to:

Evidence Act 1950, s. 115
National Land Code 1965, ss. 255, 256(3), 340
Rules of the High Court 1980, O. 83 **e**

Other source(s) referred to:

Sarkar on Evidence, 14th edn, p 1600

For the plaintiff - Azlina Abdul Aziz; M/s Foo Say Ghee & Zamzuri
For the defendant - Lua Kok Hiyong; M/s Lua & Mansor **f**

Reported by Kavitha Gunasegaran

JUDGMENT

Idris Yusoff J:

The plaintiff had given an overdraft facility to Messrs. Weng Thye Chiang Hatchery of No. 4661 A & D, Jalan Sultan Yahya Petra, Kota Bharu and to secure the repayment on demand of the balance sum on account of Messrs. Weng Thye Chiang Hatchery to the total limit of RM200,000 for principal and for interests at the rate of 10% per annum with monthly rests, commission and other usual banker's charges the defendant charged her property known and identified as Lot No. 234 held under HS(D) 483/76 (now changed to PN 387) Section 25 Kota Bharu town (the said land). The Memorandum of Charge was signed by the defendant's father Tan Ing Chang @ Tan Weng Chiang by a virtue of power of attorney granted by the defendant. The charge was registered as Charge No. 14/80 – Presentation No. 53/80. The overdraft account **g**

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a was active and remained so active that at a certain time the facility was increased to RM450,000.

b As at 8 April 1988 a sum of RM203,014.08 being principal and interest was due and owing by the defendant to the plaintiff under the said charge. In spite of repeated demands by the plaintiff the defendant was alleged to have failed, neglected and/or refused to pay the said sum of RM203,081.08 or any part thereof.

c On 21 April 1988 the plaintiff through its solicitors sent the defendant a notice of demand for payment of principal sum in Form 16E under s. 255 of National Land Code 1965 requiring payment of the said sum forthwith and with an intimation that if the said sum is not paid within one month of the service of the notice "the plaintiff shall apply for an order of sale".

d Since there was no response from the defendant the plaintiff then filed an originating summons claiming, amongst others, for an order that the said land be sold by public auction to recover the sum of RM203,014.08 with further interests thereon at the rate of 9% per annum with monthly rests from 9 April 1988 until the date of realisation. In support of the summons was an affidavit affirmed by one Noel Vong Kieon Kin, the plaintiff branch manager at Kota Bharu.

e The defendant in resisting the said application filed an affidavit-in-reply which raised several issues, the main ones were the legality and enforceability of the charge as the donee of the power in signing the Memorandum of Charge had acted *ultra vires* the power given him, the demand for RM203,014.08 was in excess of her liability under the charge, full satisfaction of the debt and estoppel. The defendant further claimed that upon the true construction of the charge documents she was not liable for any payment of interest and also for the return of the land title allegedly held by the plaintiff without any justification upon the overdraft being settled in full. Taking the issues of illegality of the charge and the liability for payment of interest, the plaintiff

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g in the further affidavit relied on the doctrine of *res judicata* as the very same issues had been raised and resolved by a court of competent jurisdiction. This was particularly so when in another related action registered as High Court Kota Bharu Originating Summons No. 31-88-1996 between Tan Sock Gin, (defendant in this action) and Hongkong & Shanghai Bank Corporation – now known as Hongkong Bank Malaysia Berhad (plaintiff in this action), Tan Sock Gin in the said originating summons applied for orders that:

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i 1. The defendant do execute a valid and registerable discharge of the Charge No. 14/80 Presentation No. 53/80 dated 8 January 1980 in favour of the plaintiff forthwith;

2. The defendant do return to the plaintiff the title deed (and all other relevant documents) to the said property known as Lot 234, P.N.387, Seksyen 25, Bandar Kota Bharu, Kelantan forthwith – see exh. MN1 to the affidavit of Mohd Noor bin Din affirmed on 15 May 1991, which contained the true copy of the Appeal Record in respect of Supreme Court Malaysia Civil Appeal No. 283/86 incorporating all the cause papers relating to the case. a
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In the affidavit in support of the originating summons affirmed by the plaintiff, she averred *inter alia* in para. 1 thereof as follows –

- 1) Under the charge dated 29.12.1979 Registered No. 53/80 folio No. 14/80, **I charged my property** known as Lot 234, P.N. 387 Seksyen 25, Bandar Kota Bharu, Kelantan to the defendant to secure the granting by the defendant to Messrs Weng Thye Chiang Hatchery of Kota Bharu, a firm belonging to my father whose name is Tan Ing Chang @ Tan Weng Chiang in which I have no interest, overdraft facilities in the said firm's account with the defendant in the sum not exceeding \$200,000.00; c
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The said originating summons came up for hearing before KC Vohrah J who dismissed the application for reasons stated in his grounds of judgment. The question of payment of interest was addressed to and resolved by His Lordship in the said judgment. In the opening paragraph of the said judgment the judge said: e

Messrs Weng Thye Ching Hatchery of Kota Bharu, Kelantan were granted an overdraft facility in their account by Hongkong & Shanghai Banking Corporation, the defendant in this case, in January, 1980.

The overdraft facility was granted after the plaintiff **charged** her property Lot 234, P.N.387, Seksyen 25, Bandar Kota Bharu to the Bank. The plaintiff's father, owner of the hatchery, also charged his property to the Bank in respect of the same overdraft facility. (emphasis added) f

The use of the emphasised word was a sequel to para. 1 of the plaintiff's said affidavit. g

The averment in the plaintiff's affidavit would, to my mind, be tantamount to an admission and the law on admission is settled in that admissions form the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission – see Privy Council decision in *The Australian Widow's Fund Life Assurance Society Limited v. National Mutual Life Association of Australasia Limited* [1914] 17 CLR (Commonwealth Law Reports) 657. h

The plaintiff's appeal to the Federal Court against the said judgment was dismissed. In the circumstances I am satisfied that in view of the admission i

- a* and the annexure to the charge document giving right to the plaintiff to charge interest as therein stated, the defendant fails on this ground.

- b* The other issue raised by the defendant seems to be the application of the principle of estoppel – namely estoppel in pais or estoppel by conduct as is presently known. The term “estoppel” is set out in s. 115 of the Evidence Act 1950 (which is in *pari materia* with Indian Evidence Act). Section 115 of the Evidence Act says:

- c* When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

- d* *Sarkar on Evidence*, 14th edn, at p. 1600 says of this section that to attract the principle of estoppel, there must exist the following elements viz (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should **act** upon the faith and the statement and (c) the plaintiff **does act** upon the faith of the statement. Of particular emphasis is the word “act” in (b) and (c) whereby in consequence of the “act” the party
- e* so acted had altered his position to his detriment or prejudice.

- f* Reverting to the instant case, there was in 1985 an offer by the plaintiff to settle the defendant’s liability for the sum of RM260,000. A series of correspondence ensued which culminated in the defendant’s steadfastly refusing to pay the said amount insisting that her liability under the charge was not exceeding RM200,000. As a result the plaintiff’s offer was deemed to have been turned down and the matter was not pursued any further. On the facts the defendant cannot rely on the principle of estoppel as contemplated by s. 115 of the Evidence Act as there is no element of mutuality or reciprocity
- g* and hence, she cannot now be allowed to resuscitate the offer which had already fizzled out. Since her reliance on the principle of estoppel cannot stand, her claim for full settlement of the debt does not arise. Accordingly, I hold that the charge is valid and is enforceable.

- h* The application for order of sale was made in pursuance of s. 256 of the National Land Code (NLC) as the land was issued with a Registry title. Section 256 says:

(1) This section applies to land held under –

- i* (a) Registry title;
- (b) the form of qualified title corresponding to registry title; or

(c) subsidiary title,

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and to the whole of any undivided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

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(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

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The onus is on the chargor to show the existence of a cause to the contrary and in a number of cases decided earlier the court held “... under s. 256(3) of National Land Code any application to the court for an order of sale by the chargee it is mandatory on the court to order a sale unless it is satisfied of the existence of a cause to the contrary – *Gondola Motor Credit Sdn Bhd v. Al-Murisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 2 MLJ 650 (SC)”. The Privy Council had held in *Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1998] 1 MLJ 457 held at p. 460 “s. 256(3) of National Land Code is mandatory. The court shall order a sale unless it is satisfied of the existence of a cause to the contrary”. The term “cause to the contrary” is not defined in the National Land Code and the Court of Appeal in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 had occasion to interpret the phrase “cause to the contrary”. In that case the court dismissed the appeal with costs and Gopal Sri Ram (JCA) held that “cause to the contrary” is established only in three categories of cases – (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

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The conditions precedent referred to in (ii) above mean that the court must be satisfied that the chargee has given an appropriate statutory notice as stipulated in the National Land Code and of the due compliance with the procedural requirements as prescribed by O. 83 of the Rules of the High Court. Hence in this respect, it is a matter of law whether or not the conditions precedent have been satisfied.

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It is common ground that a notice of demand in Form 16E under s. 255 of the National Land Code was served on the defendant and the defendant had

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- a* neglected or refused to pay the sum stated therein or part thereof within the stipulated period. The said statutory notice runs as follows:

NATIONAL LAND CODE

FORM 16E

(Section 255)

*b***DEMAND FOR PAYMENT OF A PRINCIPAL SUM**

To:

- c* Tan Sock Gin NRIC 5314300 of 4661-E, Jalan Pasir Puteh, Kota Bharu, Kelantan, Chargor under the Charge described in the Schedule below of the land so described.

WHEREAS the principal sum due and owing by you secured by the Charge amounts to \$203,014.08 as on 8/4/88, and is payable on demand.

- d* We, as Chargee, by virtue of the powers conferred by Section 255 of the National Land Code, hereby require payment of that sum forthwith.

AND TAKE NOTICE THAT, if the said sum is not paid within one month of the service of this notice, we shall apply for an order of sale.

- e* I have said earlier that the defendant's liability under the charge does not exceed RM200,000 for principal plus interest and other usual bank charges etc. but a reference to the said notice shows a demand by the plaintiff of a principal sum due and owing by the defendant amounting to RM203,014.08. Whilst it may be true that it was intended the said sum would comprise principal as well as interest as shown in the affidavit in support of the
- f* originating summons which says "As at 8 April 1988 the sum of RM203,014.08 being principal and interest due and owing by the defendant to the plaintiff under the said charge" but such an intention was not reflected in the notice thereby giving rise to certain ambiguity to the defendant.

- g* It seems that Form 16E was commonly used when there was a demand for principal sum only and Form 16D was used whether or not the principal sum was payable on demand and in addition, for payment of interest - see Federal Court decision in *Mary Michael v. UMBC Bhd* [1971] 1 MLJ 172. However, in a more recent case of *Jacob v. Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 the Federal Court held that:

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- (1) the object of the legislature was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale and in this case the chargee had given the chargor sufficient notice before coming to the court;

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(2) where there was a demand for payment of principal and interest, Form 16E could be used as well as Form 16D and the demand may be made by either form;

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Suffian LP delivering his judgment of the court said at p. 163:

During the course of the argument counsel for the chargee said that Form 16D was used because this was a demand for principal and interest, and that Form 16E was appropriate where there was a demand for principal only, probably because it is headed "Demand for payment of a principal sum". With respect I do not think it correct to say that if you demand principal and interest you use Form 16D, but if you demand principal only, you must use Form 16E. In my view, as neither section 254 nor section 255 uses the word "interest", interest may be claimed by either form.

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It seems to me that much of the argument as to whether Form 16D or Form 16E should be used would have been avoided if it is remembered that section 62 of the Interpretation Act No. 23 of 1967 provides:

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Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not intended to mislead.

Lee Hun Hoe CJ (Borneo) in his supporting judgment expressed his views on the use of Form 16E and 16D at p. 164:

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It seems that controversy always arises as to whether Form 16E or 16D should be used in this type of cases. I do not agree that if one is demanding principal and interest one would have to use Form 16D but if principal only is demanded then Form 16E must be used. Surely Form 16E can also be used to include interest, I see no reason why the words "AND INTEREST" cannot be added to the heading of Form 16E with the appropriate amount of interest inserted showing separately and clearly the principal sum plus the interest to make up a particular amount which is demanded. By virtue of section 62 of the Interpretation Act (No. 23 of 1967) it would seem that amending Form 16E would not invalidate the claim as the deviation is to make the intention clear rather than to mislead.

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In the instant case the notice in Form 16E as it were, says "... the principal sum due and owing by the defendant ... amounts to RM203,014.08" which is in excess of the defendant's liability under the charge for the principal sum and since the words "AND INTEREST" were not added to the notice, the notice seems rather ambiguous.

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Another interesting feature in the application is in regard to how the amount demanded in the notice was arrived at. In an attempt to substantiate the claimed amount the plaintiff's manager in his further affidavit affirmed on 4 January 1992 exhibited a true copy of the statement of account relating to

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- a* the overdraft facility of RM200,000 granted to Weng Thye Chiang Hatchery (the first statement). In the affidavit the deponent averred that “all the transactions shown in the said statement of account have been entries made and recorded in the ordinary book of the bank and that those entries were made in the usual and ordinary course of business and the book at all material
- b* times was and is in the custody of the bank. I have personally examined the said statement of account with the original entries made in the bank’s book and hereby confirm that the same is correct.” The said statement in fact shows detailed entries including interest and other charges incurred by the borrower retrospective to 8 January 1980, a date when the charge was registered and
- c* up to and including 7 January 1992. It is also noted from the said statement that the account as on 26 March 1988 stood at RM192,956.89 and the next entry shows on 26 April 1988 it was RM194,595.70, a figure very much lesser than the amount claimed in the notice. Perhaps on realising the substantial difference a second further affidavit affirmed on 11 December 1993 (by a different plaintiff manager) was filed in which he deposed to have examined
- d* the statement of account exhibited earlier and found that it was erroneous and prayed for the said statement be retracted and in its place he exhibited a new true copy of the statement of account (the second statement) with the same averment relating to the “transactions and entries which were made and recorded etc ...” and concluded that he had personally examined “the statement
- e* of account with the original entries made in the bank’s book and confirm that the same was true”. It is worth pointing out that the second statement contained only a few entries showing the overdraft on 26 March 1988 was RM202,317.58 and was followed by another entry showing on 26 April 1988 the amount stood at RM203,859.83. There was no explanation whatsoever to clarify the
- f* difference in the two statements which consequently has aroused some suspicion or at least has suggested that one of the managers must have sworn a false affidavit! In the circumstances I hold that the notice of demand, in Form F16E used in this case is ambiguous, defective and of no effect. Accordingly I am satisfied that the defendant has succeeded in showing the
- g* existence or a cause to the contrary and I therefore dismiss the application for an order for sale but with liberty to reapply after proper notice has been served on the defendant. I make such order following the Supreme Court’s decision in *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119 – see also *Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810; [1999] 2 AMR 1805 and *Central Malaysian Finance Bhd v. Loke*
- h* *Kok Lai* [1975] 1 MLJ 160. Costs to the defendant in any event.

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